EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

86 - 1310

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANK KUSTINA,
Appellant,

v.

THE CITY OF SEATTLE,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Frank Kustina
5201 Ballard Ave N.W.
Seattle, Wa 98107
206-789-2155
Appellant Pro se

QUESTIONS PRESENTED

1. Did the lower federal courts in 1980 and 1983 err in applying the defense claim of res judicata to appellant's federal complaint filed in 1980?

2. Did the lower federal courts err in continuing to maintain in 1986 and 1987 that the doctrine of res judicata precluded further litigation attacking the validity of a state court judgment of dismissal in spite of demonstration from a recently obtained city memorandum showing that the underlying state judgments were the result of appellee's fraud upon those courts in obtaining judgment in which case res judicata does not apply, and the judgment is subject to direct attack?

3. Did the lower federal courts err in refusing to consider appellant's

direct attack on the validity of the underlying state judgment?

4. Given the existence of the recently obtained memorandum should F.R.C.P. rule 11 sanctions be applied to appellee City of Seattle?

5. Did the absence of notice and hearing required by local ordinance deprive appellant of the place and opportunity to exercise his right to speak to protect his real property guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution, and thereby provide a basis for federal claims invoking jurisdiction under 42 U.S.C. sec. 1983?

6. Were the state courts so misled by appellee's presentational scheme before and to them as to deny standing and timeliness to plaintiff-appellant on unsupportable grounds that plaintiff's

action was based on seeking a writ of certiorari or pursuant solely to Seattle Ordinance 105462 appeal procedures involving an applicant instead of to redress in a court damage stemming from the defendants' misconduct regarding the houses which deprived plaintiff of his constitutional rights including but not limited to the right to speak at a hearing, and to seek a further remedy in accordance with RCW 7.48.020 which legislatively grants standing to "any person(emphasis added) whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance"?

TABLE OF CONTENTS

CITATIONS

CASES(continued)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANK KUSTINA,
Appellant,

v.

THE CITY OF SEATTLE,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinions of the King County Washington Superior Court, the Washington Court of Appeals, United States District Court for Western Washington Orders dated August 11, 1980 and April 25, 1986, and Ninth Circuit Court Orders dated December 14, 1983 and January 14, 1987 are reproduced in the Appendix.

JURISDICTION

The statutory basis for federal jurisdiction of this civil case in the District Court is 28 U.S.C. 1343(1)(3)(4) and 42 U.S.C. 1983. This petition is being docketed in this Court within 90 days from the Ninth Circuit Order dated January 14, 1987. That Order specifically states "No petition for rehearing will be entertained" so perfection of any such attempt was thought futile. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Const.:

> Congress shall make no law . .abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment, United States Const.:

> No person shall . . . be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Const.:

Sec. 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. sec. 1983. Civil Action For Deprivation of Rights :

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16 U.S.C. sec. 470. The purpose and declaration of policy of the National Historic Preservation Act is reproduced in the appendix.

Seattle Ordinance 105462 creating the Ballard Avenue Landmark District is reproduced in the appendix.

STATEMENT OF THE CASE

The matter in dispute centers around issuance of a certificate of approval and a building permit for the siting and relocation of two wooden houses into the Ballard Avenue Landmark District in Seattle, Washington. Seattle Ordinance 105462 creating the district in sec. 5 sets out the uniform procedure for issuance of each certificate of approval.

Appellant filed suit on August 23, 1977 in King County, Washington Superior Court to abate as a nuisance the structures sited and remodeled in the landmark district pursuant to a procedure spelled out by Washington State statutes. At a summary judgment proceeding the case was dismissed. The Washington State Court of Appeals affirmed the dismissal. The Washington State Supreme Court denied appellant's petition for review.

In 1980 appellant filed a federal suit. The district court held that the doctrine of res judicata precluded certain claims. In 1983 the Ninth Circuit Court of Appeals affirmed the district court's holding. In 1984 this Court denied certiorari.

Appellant came away from the Ninth Circuit oral hearing and decision in 1983 with that courts impression that the matters presented in his 1980 federal complaint were solely complex state claims. If as appellant will demonstrate federal claims were before the Ninth Circuit in 1983 then that panel's action constituted abstention which deprived appellant of federal fact determination by the federal district court.

Left at that time with no other alternative appellant returned to the state courts to recall the state mandate.

Such attempt was accompanied by an explanation that the interim time(4 or 5 years)had been used to bring federal suit and seek review, but in spite of such explanation the state courts ruled that under state rules such delay was unreasonable in seeking to recall the state mandate, and refused to allow appellant to proceed to present his contentions at an oral hearing. That sequence is analogous to what the federal rules were designed to avoid--being in the wrong court and then getting shut out of the other court.

In 1985 appellant presented a petition titled "Plaintiff's Petition to Enjoin Enforcement", but the Clerk of the Washington Supreme Court refused to file it saying that under the rules of the Washington Supreme Court there was no provision for consideration of such

petition. Appellant came away with the impression that the Washington Supreme Court did not read or consider that petition since the Clerk refused to file it so as to bring about a halt to further processing of that petition to the Washington Supreme Court.

In January 1986 appellant filed his second federal suit naming appellee as defendant. That suit is based in part on demonstrating that the appellee perpetrated fraud on the court in obtaining state judgments upon which federal courts have applied res judicata. Both the federal district and appeals court refused to consider appellant's demonstration of fraud by appellee in obtaining the underlying state judgments used and applied in federal court as a res judicata defense.

The remaining claims of the 1986

federal complaint were dismissed with prejudice. Appellant questions whether those claims should have been dismissed without prejudice rather than with prejudice. Appellant maintains that those claims or the opportunity to amend then state or will state valid federal or pendent claims based on the record. But appellant simply does not have the resources of time and money to adequatedly present them in this writ. Appellant does not feel under the facts presented such failure should be considered or construed as his waiver of such right or privilege.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT.

A. APPELLEE'S ABUSE OF POWER, MANIPULATIVE ATTEMPT TO AVOID AND ELIMINATE THE HEARING MECHANISM AND CONSTITUTIONAL PROTECTIONS PROVIDED AND REQUIRED BY AND FOR THE LEGITIMATE OPERATION OF THE LOCAL HISTORIC PRESERVATION LAW CONSTITUTES AN INCURSION THAT UNDERMINES THE EXPOSITION AND ENFORCEMENT OF HISTORIC PRESERVATION LAWS AND OTHER GOVERNMENT CLEARANCE LAWS ADDRESSED BY THIS COURT IN PENN. CENTRAL TRANSP. CO. v. N.Y.C., 98 S CT 2646(1978).

In Penn. Central this Court summarized, rationalized, and legitimized the operation of the law there by among other things pointing out a provision whereby the Commission there makes its determination "after giving all interested parties an opportunity to be heard" at the designation stage. The constitutional question here involves, in terms of the Penn Central analysis, the

opportunity to be heard at the hearing stage for a certificate of approval--called "appropriateness" in Penn. Central. The existence of such hearing is required to guarantee and exercise the First Amendment right to speak. For that reason a hearing is required by sec. 5(b) of the local ordinance prior to any district board action on each and every application for a certificate of approval for exterior building alteration.

In bringing state and federal lawsuits appellant has at all times maintained that notice and hearing prior to action taken on the application in question never occurred. There was no hearing process to legitimize the purported governmental clearance (certificate issuance) from infringing on appellant's constitutional rights.

Notice and hearing are the guaranteed point of entry for public input and participation in carrying out the public policy of historic preservation.

The state court's misstatement of fact regarding a hearing is without any fair or substantial support. In addition, as will be discussed in "II B" below that is because fraud was perpetrated upon the courts by the appellee in obtaining state judgment and res judicata in federal courts.

B. RES JUDICATA PRECLUSION IS INAPPLICABLE BECAUSE THIS IS A CASE WHERE APPELLANT HAS BEEN COMPELLED TO ACCEPT A STATE COURT'S DETERMINATION OF ISSUES ESSENTIAL TO THE RESOLUTION OF FEDERAL QUESTIONS.

Federal courts are not bound by state court determinations of what the United States Constitution requires. In the name of comity and res judicata the lower courts have surrendered the "onus

of authoritatively interpreting our federal Constitution" when compliance with that document's meaning must be found regarding procedural safeguards required by the Fifth Amendment's due process clause and the First Amendment's right to speak clause, see, e.g., Hanna v. Plumer, 380 US 460(1965).

Viewed in terms of F.R.C.P.(Title 28 USC) rule 56(c) there was unfairness and inadequacy in state procedures which culminated in state court summary judgment dismissal. The rule of confrontation recognized by federal courts to protect the integrity of Rule 56c required a state court trial of the genuine issues presented.

The underlying state court summary dismissal was clearly erroneous under Rule 56c because the appellee City as moving party failed to sustain its

burden of showing initially the absence of a genuine issue concerning any material fact. The record clearly shows a dispute over the existence or non-existence of facts regarding notice and the hearing required by the district ordinance, whether a necessity existed or was a cover up of the alleged misconduct, whether an abuse of power occurred, whether secretcy was permissible, and whether the motivation of the City in acting upon and issuing the certificate was self-serving as alleged.

Appellant had no choice but to initially turn to a state court in 1977 to protect his federal constitutional rights because at that time a city was not prior to this Court's decision in Monell v. Dept of Soc'l Svcs of NYC, 98 US 2018(1978), considered a "person" in a federal court suit for constitutional

deprivation under 42 USC sec. 1983--a congressionally created remedy.

Direct appeal to this Court within the time limit for appeal from the state court judgments was effectively foreclosed because appellant had embarked on his duty to mitigate the damage caused by appellee's misconduct. That mitigation effort required 16-hour days of strenuous physical and mental labor in preparation for remodeling appellant's real property. Upon initial completion of the contractual and financial obligations appellant was forced to undertake to mitigate the damage to his constitutional rights caused by appellee's misconduct and in furtherance of the National Historic Preservation Act(16 USC 470) appellant relying on the access provided by the Monell decision granting federal jurisdiction over the appellee

City for 42 USC 1983 purposes filed his first federal suit. Appellant by his first federal suit sought to make use of 42 USC 1983 enacted by Congress and ruled on by this Court in Monell for federal court jurisdiction of his constitutional claims.

In England v. Louisiana Bd of Med'l Examiners, 375 U.S. 411(1964) this Court makes a relevant point pertainent to the impropriety of dismissal of appellant's first federal suit. The Court observed that limited federal review of the state court adjudication, consisting of direct review in the Supreme Court by way of certiorari or appeal,

> is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would

> deny him the benefit of making fact findings. How the facts are found will often dictate the decision of federal claims.
>
> "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.", Townsend v. Sain, 372 U.S. 293,312 (1963).
>
> The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts, England v. La. Bd of Med'l Examiners, 375 U.S. at 416-17(1964).

As will be described below in "II" the fraudulent scheme by which appellee obtained state court summary judgment dismissal so misled the state court to mischaracterize and attribute to appellant an admission contrary to his state court position. The City also successfully urged that ratification, making appellant's state claims moot, was required as a matter of law in spite of a city memorandum(copy attached in

Appendix as IIC)showing that a hearing necessary for ordinance compliance and for the city to gain summary judgment had not occurred as appellant maintained.

The state courts so passed over appellant's constitutional rights and protections sought to be vindicated as to make their recognition a myth rather than a reality. Examination by a federal court of that action was required and is an unavoidable consequence of our dual court system to determine whether the state court procedure and process was fair regarding appellant's claim of deprivation of his federal constitutional rights.

C. THE LOWER FEDERAL COURTS REFUSAL TO CONSIDER APPELLANT'S DIRECT ATTACK SHOWING THAT THE UNDERLYING STATE JUDGMENTS WERE THE RESULT OF APPELLEE'S FRAUD UPON THOSE COURTS IN OBTAINING JUDGMENT ALLOWED TO BE USED AND APPLIED AS A DEFENSE IN FEDERAL COURT SO FAR DEPARTED FROM THE

ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS RECOGNIZED BY THIS COURT IN HAZEL-ATLAS v. HARTFORD CO. AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The specific showing demonstrating appellee's fraud in obtaining the underlying state judgments will be dealt with in "II B" below which as required by the Hazel-Atlas decision shows how appellee misled the courts to mischaracterize facts leading to their decision.

II. THE DECISION BELOW IS BASED UPON SEVERAL SERIOUS MISSTATEMENTS OF FACT AND THEREFORE CONSTITUTES A MISCARRIAGE OF JUSTICE.

A. THE WASHINGTON STATE COURT OF APPEALS CHARACTERIZED APPELLANT AS BEING "AGAINST THE BALLARD AVENUE LANDMARK DISTRICT" FOR SEEKING TO USE A COURT TO BRING ABOUT COMPLIANCE WITH THE STATUTORY PROCESS FOR THE UNIFORM PROCESSING OF EACH APPLICATION FOR A CERTIFICATE OF APPROVAL IN THE HISTORIC DISTRICT.

Appellant brought suit to have the appellee abide and act in accordance with the local ordinance. Compliance with the uniform processing requirements is not

against the district, but rather is in furtherance of the local ordinance and the National Historic Preservation Act (16 USC 470) policy which the local ordinance seeks to implement.

B. THE WASHINGTON STATE COURT OF APPEALS ATTRIBUTED TO APPELLANT THE FACT THAT HE ADMITTED THAT HE ATTENDED A PUBLIC HEARING ON SUCH PROPOSAL ON JULY 27, 1976 WHICH WAS NOT TRUE AND CONTRARY TO HIS PLEADINGS AND STATED POSITION.

Appellant alleged and maintained that the July 27th gathering was not a hearing. A recently obtained City memorandum dated August 5, 1976 supports appellant's position that the requisite mandated hearing was never held. Not only did appellant know that no notice or hearing occurred as required by the district ordinance, but the City's own record as evidenced by the August 5th memo(Appendix itemIIC)describes the July 27th gathering as "in essence a

community meeting" as distinguished from a "hearing". The difference between a meeting and hearing discussed there goes to the heart of the issues sought to be adjudicated at trial.

Thus, while the City was urging and insisting before Washington state courts that ratification was required as a matter of law and that the claims were moot, the City's own record shows a fundamental discrepancy as regards the omission of a "hearing". The City by its legal presentation misled the state courts to infer and mischaracterize the July 27th community meeting as a hearing.

Viewed in terms of Unioil v. E.F. Hutton, 802 F2d 1080 (9th Cir. 1986), how could reasonable inquiry in the preparation and presentation before a court avoid knowledge of or the contents of the August 5th memo showing that

no hearing occurred? Even though Unioil speaks to a Rule 11 amendment in 1983 providing sanctions, a basic absence of candor by the City or its counsel can not here be excused before that date or since 1983 under Rule 11 in presentation before state and federal courts including this Court in its October 1983 term regarding an earlier petition for certiorari that year by appellant. Rule 11 sanction against appellee may be required here.

Given the existence of the August 5th memo how can it be said the City did not omit facts critical to the application of the rule of law involving ratification and mootness relied on in obtaining the state judgment and res judicata recognition of that judgment in federal court.

If in the Unioil case the Alioto

firm has to be held to the standard as a specialist in complex business litigation then the City must here be held to a similar standard as to the occurrence of a simple hearing irregardless of its competency. The City misled the court about the facts and the law as part of a scheme to cover up its misconduct.

The August 5th memorandum was presented to the federal courts below in 1986 and 1987. Those courts refused to consider appellant's direct attack that the underlying state court judgment was the result of fraud on the court perpetrated by appellee as shown in part by the contents of that memorandum. A serious misstatement of fact is presented in the opening paragraph at page 2 in the 1987 Ninth Circuit Court of Appeals' decision before this Court which incorporates the reasoning in paragraph

2 at page 2 of the district court's ORDER. The claim based on the contents of the August 5th memo has never before been made to any state or federal court. Since the existence and knowledge of the contents of that memorandum was only recently learned by appellant, the showing made to the lower federal courts had never been made to any Washington state or federal court. The correctness or incorrectness of the state courts' failure to consider appellant's contentions, which included the Washington Supreme Court's refusal in May 1985 to even file "Plaintiff's Petition to Enjoin Enforcement of Judgment", should not foreclose the recourse here sought to demonstrate that the state judgment was obtained by appellee's fraud on the court. Since the Washington Supreme Court has refused to

file a previous petition submitted to it by appellant it is thought futile to seek the relief here sought before it since it is appellant's understanding from the previous experience just described that no procedure rightly or not exists in the Washington Supreme Court rules for presentation of appellant's contentions.

Appellant resorted to the equitable jurisdiction of a federal court to present his contention that the state judgment was obtained by appellee's fraud on the court based on this Court's decision in Hazel-Atlas and a paragraph in U.S. v. Fallbrook P.U.D., 193 F Supp 342, 361(1961) which reads:

> A proceeding for equitable relief concerning a judgment is treated as a direct, as distinguished from a collateral attack, and therefore the doctrine of res judicata does not apply,(citation omitted). Further, there is

> no requirement that such a proceeding be tried in the court which originally rendered the judgment, (citation omitted), and a Federal court has jurisdiction to grant such equitable relief from State court judgments, McNeil v. McNeil, 9 Cir., 1897, 78 F. 834, affirmed 9 Cir., 170 F. 289.

Thus, recourse to federal court relying on this Court's decision in Hazel-Atlas v. Hartford, 322 US 238, 244 (1944), was attempted, but the federal courts below refuse to consider and rule upon appellant's showing demonstrating fraud upon the courts.

In fairness to the courts below they may not grasp the fact that appellant only recently learned of the facts giving rise to the showing of fraud sought to be made. But the Memorandum and Order states that "No petition for rehearing will be entertained" so appellant's only recourse is to this Court to clarify any material fact or

law overlooked in the decision, see, e.g., CA 9-086(5/7/82) regarding FRAP 40.

Another specific instance showing fraud perpetrated on the courts is provided by appellee City's fabricating a situation for the Department Director to secretly decide upon and issue the certificate of approval on June 3, 1976 and then misstated where the power to act was to rest and how processing of the application for the certificate was required to occur. The City urged that the Director possessed authority to unilaterally act upon the application. Such presentation was totally at odds with the processing authority and procedural requirements required by the legislative history incorporated into the text of the district ordinance which removed any such notion of authority in a city hall official and uniformly

placed it solely with the district board in the first instance.

Enactment of the district ordinance was reached only after agreement that local board control and not city hall usurpation as here occurred would exist or undue influence by the City as here also occurred would occur. The City failed to accept that reality and embarked on a vindicative self-serving scheme to gain control of the district's design review mechanism for approving the applicant's ill-conceived plan to site and remodel the houses in the district irregardless of compliance with the purpose of the district and the procedures and mechanism required by the local ordinance for carrying out that purpose.

The legal deficiency that appellee can not overcome is discussed at page 33

of appellant's brief to the Ninth Circuit. That deficiency is that "A hearing was required by Seattle Ordinance 105462 sec. 5(b) prior to the purported September 14, 1976 board endorsement". That hearing as a reality did not occur. How that requirement was mischaracterized or skipped over in granting ratification is due solely to the fraud on the courts perpetrated by appellee.

Part and parcel to that plan to mislead the courts was the City's state counterclaim that appellant's state claims were frivolous and that he knew his claims were false and constituted a willful and malicious abuse of process. In the absence of notice and a hearing that counterclaim was baseless and portrayed appellant to the court as abusing the legal process he rightfully sought to invoke to vindicate his

federal constitutional rights. Once raised the City never pursued or proved that depiction of appellant.

What has transpired does not measure up to the standard recently expressed by a prominent American across the street from this Court in which he said:

> . . .Our revolution is the first to say the people are the masters and government is their servant.
>
> Don't ever forget that. Someday, you could be in this room, but wherever you are, America is depending on you to reach your highest and be your best, because here, in America, we the people are in charge.

Recollection of that speech presents a relevant reminder of the ordeal appellant has had to confront in seeking to try his claims. What would happen if someone watching on television or in the gallery and seeing the members of this Court seated in their robes from saying this Court was present and in session that evening. That absurdity is

exactly what has transpired as regards appellant's claims. Appellant was no more at a hearing on July 27, 1976 as was this Court sitting in session the evening of January 27, 1987 because of the Court's mere ceremonial presence(courtesy) that evening in a room in which a presentation was made. Just as this Court was not called into session and convened to constitute a tribunal so too on July 27, 1976 appellant's presence that evening can not be construed as being at a public hearing in the historic district which did not take place because the formality required for convening the board or holding a hearing did not occur.

Relying on this Court's decision in Hazel-Atlas resort to any rule of finality such as res judicata is outweighed by the countervailing public interest in

"preservation of the integrity of the judicial process" from enforcing a judgment obtained by fraud upon the court. Initial enforcement and continuing federal court recognition of the underlying state judgment constitutes an unconscionable injustice.

III. THE DECISION BELOW INVOLVES IMPORTANT PRINCIPLES OF CONSTITUTIONAL LAW HAVING EXTRAORDINARY PUBLIC SIGNIFICANCE.

The First Amendment is predictated on recognition and preservation of forums such as the existence of the required hearing here to allow all views to be presented and considered prior to board action. The board or any governmental body can not make a reasoned decision without access to and presentation of any and all relevant information effecting an application before it. Have we reached the point where only

those in agreement with governmental action will be provided the mandated forum and allowed to speak or participate?

A hearing means a formal hearing at which notice is given and testimony taken and not simply a community meeting at which comments are exchanged as a courtesy. The mischaracterization of a community meeting as a hearing left uncorrected or unrecognized will have a sobering effect and quell community meetings under threat that any such comment in the interest of participation might later as here occurred be manipulated and be held by a court against a person as an admission so as to constitute the opportunity for testimony and to have presented expert witnesses in support of such testimony at an imagined hearing that never took place.

IV. THE JUDICIAL CONDUCT BY WHICH THE ORAL HEARING BEFORE THE NINTH CIRCUIT WAS SUDDENLY AND HASTILY TERMINATED LEFT THE APPEARANCE THAT SUCH HEARING WAS A MERE FORMALITY RATHER THAN SERVING AS THE FORUM ESTABLISHED BY COURT RULES TO CLARIFY THE ISSUES PRESENTED.

Appellant feels it necessary to call to this Court's attention judicial conduct whereby oral hearing before the Ninth Circuit panel was suddenly brought to an end. What occurred regarding the order of argument may be correct according to the letter of the appellate rules, but the spirit of hearing both sides and providing appellant the opportunity to make a separate opening and concluding argument did not fairly occur. Appellant made an opening argument that is believed to have lasted a little more than 7 minutes of his alloted 15 minutes. Not wanting to use up the alloted time appellant made it clear to the court that he wanted to

make a closing argument and that he would reserve the remainder of his time until after opposing counsel made his presentation. Appellant may have in the excitement of the moment misspoke to say for rebuttal or after rebuttal. Irregardless of his misuse of the word "rebuttal" or not, it was clear to him from the demeanor of the court that in sitting down to allow appellee's counsel to speak that he(appellant) would upon such presentation be allowed to rebut appellee's argument and make the closing argument he had specifically reserved.

A tragedy not initially cleared up in 1976 has step-by-step taken on new dimensions and acquired serious defects as recognition of the absence of the hearing required by the local ordinance for ordinance compliance has sought to be established and recognized in state

and federal courts.

The whole episode in trying to obtain a hearing from the time of appellant's drafting and signing a petition to the Department Director requesting that the board be convened in accordance with the local ordinance to receive input regarding the application to the conduct of the Ninth Circuit oral hearing is proof of appellant's often expressed belief that a little problem left unresolved takes on a life of its own and may suddenly become a big serious problem.

Counsel for appellee rose to make his oral presentation with text or notes in his hand and Judge Beezer said, "You're not going to speak, are you?", to counsel for appellee. Counsel appeared startled and said, "No". Appellant then rose to attempt to speak and make

his closing presentation and was told that he could not speak because there was nothing to rebut. The court was hastily adjourned. Appellant fearing contempt from the tone and utterance of Judge Beezer said nothing as the court walked from the room before appellant could gather his thoughts.

Appellant may be wrong as to what he said and compliance with the letter of the rules regarding oral argument may have occurred, but appellant feels Judge Beezer over-stepped his bounds in the conduct of disallowing or suggesting presentation non occur under appellate rules, see, e.g., FRAP Rule 34 and Rule 47.

In a telephone conversation with appellee's counsel appellant asked him about his recollection of what happened at the oral hearing. Appellant asked

him if he intended to speak at the oral hearing and he said, "Yes". He went on to say, "When a court suggests you not speak you don't". Counsel for appellee further said, "While he had seen appeals panels never ask a question he had never seen an instance(as occurred) in which time requested to be reserved for a closing statement was not provided.

The foregoing was difficult for appellant to relate and charge because appellant does not have a prosecutorial disposition or mentality and he is not out to get or speak wrongly against anyone. But appellant would not be consistent in urging compliance with the hearing formality in 1976 if in 1987 he did not also concern himself with the fairness of the oral argument process before the Ninth Circuit panel.

Appellant may be wrong and Judge

Beezer may have acted correctly according to the letter of the rules, but to appellant, opposing counsel, and the sole person in the audience area Judge Beezer's conduct in hastily ending argument was unusual and strange. Appellant feels that conduct was trickery.

Based on the tone of the Memorandum and Order it may well be likely that full use of argument time and presentation might not have changed the result. There is no way of knowing. On the other hand, there is the possibility that clarification might have resolved the outcome differently and have avoided or made unnecessary this petition for certiorari--a time consuming and costly exercise.

Two other things might have effected judicial conduct. First, appellant can not help but feel that Judge Beezer may

have just been angered because the Wash-
ington State appeals decision in question
was signed by Judge Farris now on the
Ninth Circuit. Appellant had to call
to Judge Farris' clerks' attention that
perhaps Judge Farris who was assigned to
the panel first assigned to hear
argument might under rules of judicial
conduct not be able to sit. Judge Farris
recused himself and was replaced by
Judge Koelsch.

It is only speculation on appellant's
part but something behind the scenes may
have been involved and festered itself
in Judge Beezer's usual conduct at the
close of the oral hearing .

Second, it must be kept in mind that
appellant was acting pro se and Judge
Beezer may have just wanted to put
appellant in his place for not having a
member of the bar present his case or

persuading him not to appeal. That notion corresponds to the decision which comes across to appellant as stating he should not have been taking up the court's time. That notion is reinforced by the ruling that "No petition for rehearing will be entertained".

Appellant remains puzzled as to the hasty cut-off of oral presentation and the sudden adjournment.

CONCLUSION

The reason for appending a Bill of Rights to the Constitution was to prevent government from taking certain kinds of action which occurred here. This is less a case about the mechanical application of certain subsequent events to reach a rule of finality as it is the protection of basic constitutional principles. Included among that protection is the

right to fair access to initially present, establish, and proceed at trial to present a case against abuse of power by government officials. As the foregoing demonstrates appellee City engaged in fraud upon the courts in obtaining and having appellate courts sanction judgment by which appellant was stripped of precious rights guaranteed by amendments one, five, and fourteen that forbid government from the tyranny which occurred.

Any efficiency behind a rule of finality must give way to mechanisms, including the fair use of a court, that would counteract the temptation of the municipal government here to over-reach and intrude on and strip the appellant of the opportunity to exercise his right of speech at a board hearing so as to thereby protect his real property

located within the historic district from which he derived his livelihood. His efforts and the right to speak were in furtherance of those amendments and the National Historic Preservation Act(16 USC 470).

The idea of government resulting in our Constitution and the procedures for implementing it through laws such as the local district ordinance here was the result of the fundamental notion and consequence that it set up a government by open debate in the form of discussion and argument. The mechanism for such initially never occurred in the absence of the required hearing in accordance with sec. 5(b) of the local ordinance prior to action taken by the board on the application in question.

The courts below have been oblivious to the legal consideration upon which the

local historic ordinance is based. The consideration incorporated into the text of the local ordinance for the agreement to legislatively transfer development rights held by district real property owners such as appellant regarding exterior building alterations to the citizen design review concept involving the district board is premised on the reality that a hearing is required and must take place upon receipt of an application before any further board action. Such mechanism and procedure is required of all applications to allow input and participation before the board as appellant here sought by signing a petition. The reality of the notion of a hearing did not occur. As appellant has maintained, without notice and hearing the forum for the "contest" of public debate and participation required by the

First and Fifth Amendments to the United States Constitution here applicable through the Fourteenth Amendment did not exist.

Never is a court as the forum sought by resort to the courts below more necessary to be in place and properly function under our system than as here when tyranny of government by certain government officials results in denial of recognition and protection of individual rights. Such is the very purpose and reason we have a judiciary branch of government.

In addition to imagining that a hearing took place when in reality as the showing of fraud upon the court demonstrates, the state courts fell hook, line, and sinker for the City's presentation that the houses were "good" for the district. Such under this Court's

standard in Berman v. Parker, 348 US 26 (1954) is not the proper function of a court. Here a court does not determine what is good or bad. That is for a hearing before the district board. Instead of fraudulently urging and presenting the facade of full ordinance compliance before the state courts appellee should have required the applicant to submit the building's facade to the hearing mechanism.

Finally, the impediments caused by appellee's deprivation of appellant's constitutional rights and time in seeking judicial determination of his claims have taken there toll. Appellant had his right to speak taken away from him contrary to constitutional guarantees. His real property sought to be protected and preserved by his speaking has been foreclosed and he has thus lost the sole

source of his livelihood derived from that property. Appellant had to borrow money to reproduce the required copies of this petition and to pay the filing fee with the Clerk. It should also be kept in mind that there is a connection between appellee's alleged misconduct and appellant's inability to pay for legal representation. Unlike appellee, appellant can not levy and collect taxes and does not have a floor of lawyers to represent him as does appellee. Appellant's time and money have for a decade been expended and exhausted in seeking to correct a public and legal disgrace.

What has been allowed to occur is not the way to honor the Constitution.

For the foregoing reasons, Frank Kustina hereby respectfully prays that his petition for Writ of Certiorari be granted.

Respectfully submitted,

Frank Kustina

DATED:
2/3/87

Frank Kustina
5201 Ballard Ave NW
Seattle, Wa 98107
206-789-2155

APPENDIX

I. Opinions of the Courts Below
   - A. King Cy Superior Ct dtd 6/14/78
   - B. Wa Ct of Appeals dtd 4/9/79
   - C. Fed Dist Ct Order dtd 8/11/80
   - D. 9th Cir Order dtd 12/14/83
   - E. Fed Dist Ct Order dtd 4/25/86
   - F. 9th Cir Order dtd 1/14/87

II. Other Appended Materials
   - A. Portion of Seattle Ord. 105462
   - B. Portion of Nat'l Historic Preservation Act of 1966(16 USC 470)
   - C. Portion of Seattle Dept of Community Development Memorandum dtd Aug 5, 1976 which appears as CR 10 Exhibit A in Excerpt of Record to 9th Cir in(IF)above

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

FRANK KUSTINA, Plaintiff,	)	NO. 833 228
vs.	)	JUDGMENT OF DISMISSAL UNDER CR 12(b) and CR 56(b)
HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; (et al omitted) Defendants.	)	

This matter having come on regularly for hearing before the undersigned Judge of the above-entitled court upon the motions of defendants for judgment dismissing plaintiff's complaint with prejudice pursuant to CR 12(b) and CR 56(b); the court having reviewed the pleadings, motions, affidavits, memoranda and other documents on file herein and having heard argument from counsel and from plaintiff, and it appearing to the court

that plaintiff's complaint fails to set forth any claim upon which relief could be granted, that there is no genuine issue of material fact and that defendants' motions should be granted for the reason that plaintiff's action was brought beyond the 20 day time required by law, and is at any rate barred by principles of estoppel and laches, for the reason that plaintiff has not alleged, identified or sustained any legal injury, is not aggrieved and lacks standing, and for the reason that the uncontroverted affidavits on file herein establish that plaintiff's claims predicated upon Seattle Ordinance 105462 are without merit as a matter of law and are at any rate moot; Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is dismissed with prejudice and with costs to defendants.

DONE IN OPEN COURT this 14th day of June, 1978.

/s/
JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANK KUSTURA, Appellant,	)	
	)	NO. 6698-I
v.	)	DIVISION ONE
HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; (et al omitted) Respondents.	)	FILED: APR 9 1979

DORE, FRED, J. -- Plaintiff alleged that he was the owner of property in Ballard, and he brought this action against the Ballard Avenue Landmark District demanding the removal of two small historic residential houses that Historic Seattle Preservation and Development Authority (Historic Seattle) had acquired, renovated and moved to their present location in Ballard. Along with Historic Seattle, plaintiff's complaint named as defendants the City of

IB

Seattle, the former director of Seattle's Department of Community Development, the acting director of that department, the Superintendent of Buildings for the City of Seattle, all members of the Seattle City Council, and Seattle's former mayor. The court granted the defendants' motion for summary judgment of dismissal. Plaintiff appeals.

ISSUES

1. Did the trial court err in holding that plaintiff had no standing to challenge the administrative actions of Historic Seattle Preservation and Development Authority?

2. Did the court err in holding that plaintiff's petition for writ of certiorari was untimely?

3. Did the trial court err in holding that plaintiff's complaint, coupled with the uncontroverted affidavits before

the court, failed to set forth a viable claim upon which relief could be granted?

STATEMENT OF FACTS

Historic Seattle is a public authority chartered by the City of Seattle, pursuant to RCW 35.21.725 and Seattle City Ordinance 103387. Historic Seattle's charter states that the public authority's purpose is to preserve and enhance the historic heritage of the City of Seattle for the mutual pride and enjoyment of Seattle's citizens and for the creation of a more livable environment within the historic areas of the city.

On October 15, 1976, the Ballard Avenue Landmark District (Seattle Ordinance 105462) was created to preserve, protect, enhance, and perpetuate those elements of the district's cultural, social, economic, architectural, historic or other heritage. The ordinance

prohibited certain changes in the buildings, structures and other visible property therein without a certificate of approval. The ordinance further established a board consisting of 5-7 members to be elected, which would administer and enforce the ordinance. Upon application for a certificate of approval, the ordinance provided that the board act to review the application and grant or deny the same within 30 days. If the board failed to act within the 30-day limit, the application would be deemed approved and the director of the Department of Community Development would thereafter issue a certificate of approval.

In May of 1976, Historic Seattle acquired two of Seattle's oldest residential houses, the "Pioneer Houses." The Pioneer Houses were in danger of

of being demolished as the result of commercial development in Seattle's International District, and Historic Seattle acquired the houses for the purpose of relocating and renovating them in order to preserve an important part of Seattle's heritage.

Earl Layman of Historic Seattle stated in his affidavit in reference to the two Pioneer Houses as follows:

> The (pioneer) houses are among the oldest structures still existing in the city. Modest single-family structures of this type once existed in considerable numbers along Ballard Avenue in what is now the Landmark District . . . (The pioneer houses) preserve and enhance the District's cultural, historic and architectural heritage by providing a unique example of a type of structure that once was common on Ballard Avenue.

Historic Seattle thereafter sought to relocate the houses to the Ballard Avenue Landmark District, created in April of 1976, pursuant to Ordinance 105462.

On May 26, 1976, pursuant to Ordinance 105462, Historic Seattle applied for a certificate of approval of Historic Seattle's proposal to relocate the Pioneer Houses to the Ballard Avenue Landmark District. At that time the Ballard Avenue Landmark District Board created by Ordinance 105462 had not yet been elected. That board's members were not elected until July of 1976.

Section 5(d) of Ordinance 105462 requires that the director of Seattle's Department of Community Development unilaterally act upon an application for a certificate of approval if the Ballard Avenue Landmark District Board does not act upon that application within 30 days from the date the application is submitted. Because the Ballard Avenue Landmark District Board did not act, and could not have acted, upon Historic Seattle's

application for a certificate of approval within 30 days from Historic Seattle's submission of that application, the director of Seattle's Department of Community Development, acting under the requirements of the ordinance, issued Historic Seattle a certificate of approval on June 3, 1976. In August of 1976, the City of Seattle issued a building permit to Historic Seattle pursuant to Historic Seattle's July 21, 1976 application for such a building permit to allow the relocation of the Pioneer Houses to the Ballard Avenue Landmark District. Historic Seattle moved the Pioneer Houses to the Ballard Avenue Landmark District on September 27, 1976.

Although Historic Seattle's plan to relocate the Pioneer Houses had been amply publicized in various Ballard

publications prior to September 27, 1976, and even though the plaintiff was well aware of the relocation plans well before the relocation of the Pioneer Houses, he took no action whatsoever to contest Historic Seattle's relocation of the houses until August of 1977, almost one year after the Pioneer Houses had actually been relocated in Ballard. As soon as the Ballard Avenue Landmark District Board had elected and appointed the various members of their board, the composition of which was completed after Historic Seattle had received its building permit to relocate the Pioneer Houses, the board endorsed the relocation of the houses before they were actually moved to their present Ballard site.

Plaintiff admits that he learned of Historic Seattle's plan to relocate the Pioneer Houses to the Ballard Avenue

Landmark District on June 14, 1976, and he also attended a public hearing on such proposal on July 27, 1976, which hearing was held to afford Ballard residents an opportunity to comment upon Historic Seattle's plan to relocate the Pioneer Houses.

DECISION

ISSUE 1: Plaintiff lacked standing to bring this action.

Since Ordinance 105462 does not authorize appellant's present action, such action is necessarily one pursuant to RCW 7.16.040 for a writ of certiorari to review both the issuance of a certificate of approval by the director of Seattle's Department of Community Development and the issuance of a building permit by Seattle's Superintendent of Buildings.

However, an action for a writ of certiorari may only be maintained by one

claiming to be "aggrieved" by administrative or judicial action. Jones v. Jones, 68 Wn. 2d 413, 415, 413 P. 2d 338(1966). The courts have consistently held that in order to be "aggrieved" for purposes of standing to challenge administrative actions, a plaintiff "must allege and prove that he has suffered some special damages not common to other property owners similarly situated." See Unger v. Forest Homes T.P., 237 N.W. 2d 582, 584(Mich. App. 1975), where the court held that plaintiff lacked standing to challenge an amendment to a municipality's zoning ordinance because the plaintiff had failed to establish that he had "suffered a special damage by reason of the change in the use or zoning--different from that suffered by the general public." See also Whitney Theater Co. v. Zoning Board of Appeals,

189 A. 2d 396, 399(Conn. 1963), where the court held that a plaintiff in an action to review the decision of a municipal zoning board "had the burden of proving that it was aggrieved" which "required the plaintiff to establish that it was specially and injuriously affected in its property rights or other legal rights."

In the present case, appellant has alleged no such special damage resulting to him from Seattle's actions that permitted Historic Seattle to relocate the Pioneer Houses from Seattle's International District to Ballard. Appellant has alleged only that he is the owner of property in Ballard, and such an allegation is insufficient to afford appellant standing.

Consequently the lower court properly held that plaintiff had no standing to

challenge the certificate of approval and building permit issued to Historic Seattle for the relocation of the Pioneer Houses.

ISSUE 2: Appeal untimely.

The trial court's ruling must be affirmed for the additional reason that the plaintiff's appeal was not timely. Petitions for writs of certiorari to review administrative actions must be filed within 20 days from the contested administrative action just as appeals to Superior Court from decisions of courts of limited jurisdiction must be filed within 20 days.

In the present case, no statute or ordinance gave appellant the right to challenge the administrative actions at issue here. Appellant's complaint is necessarily one seeking a writ of certiorari to review administrative

actions. Because appellant's complaint was brought one year from the administrative actions of which he complains, and not within 20 days, the lower court properly dismissed that complaint pursuant to Vance v. Seattle, 18 Wn. App. 418, 569 P. 2d 1194(1977). Moreover, even if Ordinance 105462 had authorized appellant's appeal, which it does not, that ordinance requires that such appeals be taken within 20 days. Thus, whether appellant's action is one for a writ of certiorari or one taken pursuant to Seattle City Ordinance 105462, the lower court properly ruled that appellant's action was time-barred.

ISSUE 3: Plaintiff's cause of action moot.

Even assuming the validity of plaintiff's claim, such claims are entirely moot. It is undisputed that

that once the board's elections were held and the board became operational, and reviewed the project in question, they unanimously endorsed it and approved the issuance of the certificate of approval. Such ratification cured any defect in the prior decision. Owings v. Olympia, 88 Wash. 289, 152 P. 1019(1915).

Affirmed.

/s/_____
Dore, Fred J.

WE CONCUR:

/s/_____
Faris, J.

/s/_____
Swanson, J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK KUSTINA, Plaintiff,	)	No. C80-529V
vs.	)	ORDER ON MOTION TO DISMISS
THE CITY OF SEATTLE and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY, Defendants.	)	

Having considered the motion of defendants to dismiss, together with the memoranda and affidavits submitted by counsel, the Court now finds and rules as follows:

1. Although styled a motion to dismiss for failure to state a claim upon which relief can be granted, defendants' motion is actually one for summary judgment of dismissal. Both parties have treated the motion as one for summary judgment by submitting affidavits and documents outside the

IC

record in support of their positions. The Court will therefore treat the motion as being one for summary judgment.

2. With respect to plaintiff's first eleven causes of action, it is clear that prior state court proceedings bar the assertion of those claims in this Court. Title 28 U.S.C. sec. 1738; Scoggin v. Schrunk, 522 F. 2d 436(9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Bennun v. Board of Governors, 413 F. Supp. 1274(D.N.J. 1976); Seattle-First National Bank v. Kawachi, 91 Wn. 2d 223, 588 P. 2d 725(1978). Society has a substantial interest in the finality of litigation. Once a matter has been litigated, it is wasteful of both public and private resources to re-litigate the same matter. If plaintiff desired to have a federal court rule on his claims, he should have sought certiorari before

the United States Supreme Court. In any event, the Court has reviewed the prior rulings of the state courts and is in agreement with those rulings.

3. None of the remaining claims implicate the Historic Seattle Preservation and Development Authority in any way. To the extent that those claims attempt to impose liability upon the Authority, they do not state a claim upon which relief can be granted.

Accordingly, the motion of defendants is GRANTED in part and DENIED in part. The Historic Seattle Preservation Board and Development Authority is dismissed as a party defendant. The first eleven claims against defendant City of Seattle are DISMISSED WITH PREJUDICE.

The Clerk of this Court is instructed to send uncertified copies of this

order to all counsel of record.

The Clerk shall prepare a judgment of dismissal with prejudice with respect to defendant Authority.

DATED this 11th day of August, 1980.

/s/
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK KUSTINA, Plaintiff-Appellant,	) No. 82-3603
vs.	) D.C. NO. CV 80-529 JCT
CITY OF SEATTLE, Defendant-Appellee.	) MEMORANDUM

Appeal for the United States District Court for the Western District of Washington (Seattle)
Honorable John C. Coughenour, Presiding

Argued and Submitted November 9, 1983

Before: SNEED, NELSON, and REINHARDT, Circuit Judges

Plaintiff Frank Kustina filed an action against the City of Seattle under 42 U.S.C. sec. 1983(Supp. V 1981) and under Washington state law. The district court held that the doctrine of res judicata precluded litigation of twelve of the fifteen claims. In addition, the district court dismissed another cause of action for failure to state a claim

ID

upon which relief can be granted and granted summary judgment for the City of Seattle on the merits of two state law claims. We affirm in part and reverse in part.

RES JUDICATA

When a section 1983 action is based on the same wrong that was the subject of a state court action between the same parties and the preclusion rules of the state in question would bar litigation of those issues the doctrine of res judicata precludes a federal court from deciding whether other legal theories would allow for recovery. See Allen v. McCurry, 449 U.S. 90, 96 (1980); Heath v. Cleary, 708 F. 2d 1376, 1379 (9th Cir. 1983); Miofsky v. Superior Court, 703 F 2d 332, 336 (9th Cir. 1983); Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir.), cert. denied, 423 U.S. 1066(1976); see

also 28 U.S.C. sec. 1738(1976)(requiring federal courts to give full faith and credit to state court judgments). In short,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of the state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in the state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.

Scoggin, 522 F. 2d at 437 (emphasis added). 1/

Under Washington law, all possible challenges to a common nucleus of operative facts are treated as if they had been decided in a final judgment whether or not the theories actually were raised in the proceedings. See Seattle-First National Bank v. Kawachi, 91 Wash. 2d

223, 226-28, 588 P. 2d 725, 728(1978); Sanwick v. Puget Sound Title Insurance Co., 70 Wash. 2d 438, 441-42, 423 P. 2d 624, 627 (1967). Here, the plaintiff originally brought an action against the City of Seattle in state court challenging the placement of two houses in a district zoned for landmarks and the Seattle ordinance creating that district, on federal and state law grounds. Claims one through eleven and fifteen of the complaint filed in federal court challenge the same conduct of the same defendant and the same ordinance. Therefore, even if the state court "judgment may have been wrong or rested on a legal principle subsequently overruled in another case," the doctrine of res judicata bars litigation of these issues once again. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398

(1981)(citations omitted).2/ We therefore affirm the district court's holding that that the doctrine of res judicata precludes litigation of claims one through eleven and fifteen.

FAILURE TO STATE A CLAIM

The plaintiff's twelfth claim is that the improper use of public funds jeopardized the future receipt of federal funds within the landmark district and violated state and federal law. The speculative allegation indicates only a general concern shared by other property owners within the district, rather than any threatened or actual individual injury. Because a generalized grievance brought by a taxpayer and shared by a large class of citizens does not alone warrant the exercise of federal jurisdiction, and because the plaintiff failed to plead any individual injury, the assertion of federal jurisdiction over the twelfth

claim would have been improper. See Warth v. Seldin, 422 U.S. 490, 499(1975). To the extent that the twelfth claim raised state law issues, those parts of the claim should have been dismissed without prejudice after dismissal of the federal claims. See pp. ___ infra. Accordingly, we hold that the district court properly dismissed the claim.

STATE LAW CLAIMS

The district court exercised pendent jurisdiction over the state issues raised in claims thirteen and fourteen. In cases in which a federal court exercises pendent jurisdiction over state claims, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726(1966)(emphasis added). Here, the district court, rather than granting summary judgment on the merits, should

have dismissed without prejudice the complex state law claims after the federal claims were dismissed. See Brandwein v. California Board of Osteopathic Examiners, 708 F. 2d 1466, 1475 (9th Cir. 1983)(citing United Mine Workers v. Gibbs); Townsend v. Columbia Operations, 667 F. 2d 844, 850 (9th Cir. 1982). We therefore reverse the district court's summary judgment on the state law issues raised in claims thirteen and fourteen and remand the case with instructions to dismiss the claims without prejudice.

AFFIRMED IN PART, REVERSED IN PART

FOOTNOTES

1/ In deciding whether the doctrine of res judicata precludes litigation of a claim, a federal court generally would consider

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same

> evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980) (citation omitted); see Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1351 (9th Cir. 1981); Gallegher v. Frye, 631 F. 2d 127, 128-29 (9th Cir. 1980).

2/ The plaintiff alleges that res judicata should not bar litigation of his claims because the defendants perpetrated fraud upon the state courts. We previously have reserved the question whether there is a fraud exception to the doctrine of res judicata. See Costantini v. Trans World Airlines, 681 F.2d 1199, 1202 (9th Cir.), cert. denied, 103 S. Ct. 570 (1982). However, we have emphasized that, even if such an exception exists, a party must allege fraud with particularity. 681 F. 2d at 1202-03. We hold that the plaintiff's conclusory allegations of fraud are insufficient to fall within a proposed exception to the doctrine of res judicata.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTINA, Plaintiff,	)	NO. C86-99R
v.	)	ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
THE CITY OF SEATTLE, Defendant.	)	

THIS MATTER comes before the court on motions by plaintiff for declaratory judgments to set aside judgment for want of jurisdiction and for fraud upon the court, and on a motion by defendant to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for lack of jurisdiction and failure to state a claim upon which relief can be granted. Having reviewed the memoranda, exhibits and affidavits submitted in support of and in opposition to these motions, and being fully advised, the court finds and rules as follows:

IE

Plaintiff's complaint purports to set forth nine claims for relief. For the reasons set forth below, the court concludes that defendant's motion to dismiss should be granted and plaintiff's complaint dismissed in its entirety.

1. Plaintiff's first claim concerns the bell which was at one time mounted in the tower of the former Ballard City Hall and which plaintiff seeks to have returned from its present location on the grounds of the United States Government Locks in Ballard to its historic site within the Ballard Avenue Landmark District. Plaintiff contends that this court can exercise subject matter jurisdiction over this cause of action pursuant to the National Historic Preservation Act, 16 U.S.C. sec. 470, and because the bell is currently on federal property. The court finds these bases insufficient:

the location of the bell in itself is not determinative of whether the court can exercise subject matter jurisdiction, and the legislation to which plaintiff vaguely refers does not support his cause of action.

2. Plaintiff's second and third claims concern his allegation that defendant City of Seattle perpetrated a fraud on the Washington state courts which prevented plaintiff from fairly presenting his case. He maintains, therefore, that he is entitled to relief from the judgment entered and affirmed by the state courts. The court concludes that plaintiff has failed to state a cause of action on which relief can be granted. Assuming that the facts are as plaintiff presents them, the court finds no indication that plaintiff was foreclosed from stating his position to

the state courts. On the contrary, plaintiff had ample opportunity to litigate his contentions. His current claims simply reflect his continuing disagreement with the state court's decision to reject those contentions.

3. Plaintiff's fourth claim is that the Washington state courts which rendered decisions in his prior cases and appeals lacked jurisdiction to do so because the activities of defendant City of Seattle which they ruled upon were null and void. As defendant points out, plaintiff is confusing the issue of whether defendant's activities were legal with the issue of the validity of judicial decisions concerning the lawfulness of those activities. Again, plaintiff has failed to state a cause of action on which relief can be granted.

4. In his fifth claim, plaintiff

asks for explanations of prior rulings by other courts. This court has no jurisdiction over the matter.

5. Plaintiff's sixth claim is simply a series of statements complaining about defendant's assertion of a counterclaim for frivolous prosecution in state court and the nefarious effect which plaintiff believes it had on the court. Plaintiff does not state any claim for which relief can be granted.

6. Plaintiff's seventh and eighth claims are clearly attempts to relitigate the same issues which he has already raised and which have been adjudicated in both state and federal courts. As such, these claims are barred by the doctrine of res judicata. Insofar as plaintiff's seventh claim raises new issues which he has not litigated before, he fails to state a claim on which relief

can be granted because he has not alleged illegalities.

7. Finally, plaintiff alleges in his ninth claim that defendant has acted arbitrarily, capriciously and with callous neglect regarding the Ballard Avenue Landmark District contrary to the National Historic Preservation Act and Seattle municipal law. Plaintiff further alleges interference with a business expectancy and with his constitutional rights regarding his real property. These allegations are so vague and nonspecific that they utterly fail to state a claim upon which relief can be granted.

Defendant's motion to dismiss is accordingly GRANTED. Plaintiff's motions for declaratory judgments are DENIED and plaintiff's motion for summary judgment noted for May 2, 1986 is STRICKEN as

moot. This action is DISMISSED with prejudice.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 25th day of April, 1986.

/s/
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK KUSTINA,	) NO. 86-3882
	) DC# CV-86-99-R
Plaintiff-Appellant,	)
	) MEMORANDUM AND
vs.	) ORDER
	)
THE CITY OF SEATTLE,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court for the Western District of Washington
District Judge Barbara J. Rothstein, Presiding

(Argued and Submitted January 8, 1987)

Before: KOELSCH, WRIGHT, and BEEZER, Circuit Judges.

At the request of plaintiff-appellant, this appeal was expedited and set for argument on the first available date. We now affirm the judgment of the district court of April 25, 1986, and direct the clerk to issue the mandate of this court forthwith. No petition for rehearing will be entertained.

IF

We find wholly without merit Kustina's first claim for declarative and injunctive relief. He sought an order requiring the city to move an old bell from the grounds of the federal government locks to some site within the Ballard Avenue Landmark District. Plaintiff failed to allege, and this court has not found, law sufficient to support such an order. The district court properly found that it had no subject matter jurisdiction. There is no substantial federal question.

Equally without merit are appellant's several claims attacking the validity of a state court judgment of dismissal. These were before this court in an earlier appeal. In a Memorandum decision of December 14, 1983, we held that the doctrine of res judicata precluded further litigation of such claims. See

Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir.), cert. denied, 423 U.S. 1066 (1976). Appellant had full opportunity to present his contentions to the Washington courts. We refuse to consider again his continuing disagreement with the decisions of those courts.

The district court dismissed Kustina's remaining claims for lack of jurisdiction, failure to state a claim on which relief can be granted or vagueness. The court properly denied Kustina's motion to amend his pleadings.

We have considered all of the appellant's contentions, find them without merit and affirm the judgment.

ORDINANCE 105462

AN ORDINANCE creating the Ballard Avenue Landmark District; . . ., prohibiting certain changes in buildings, structures and other visible property therein without a Certificate of Approval, . . .

Section 4. Ballard Avenue Landmark Board.

(b) The District Board shall elect its own chairman and adopt in accordance with the Administrative Code (Ordinance 102228) such rules of procedure as shall be necessary in the conduct of its business, including (i) a code of ethics, (ii) rules for reasonable notification of public hearings on applications for Certificates of Approval and applications for permits requiring Certificates of Approval in accordance with Section 5 hereof, and (iii) rules for reasonable notification of public hearings on development and design review guidelines

II A.

and amendment thereof. A majority of the currently qualified and acting members of the District Board shall constitute a quorum necessary for the purpose of transacting business. All decisions shall be made by majority vote of those members present, and in case of a tie vote, the motion shall be lost. The District Board shall keep minutes of all of its official meetings, which shall be filed with the Director.

Section 5. Approval of changes to buildings, structures and other visible property within Ballard Avenue Landmark District.

(b) All applications for a Certificate of Approval, and all applications for any permit requiring such a certificate of approval, (hereinafter both included in the words "such application") shall be submitted

to the District Board. Within thirty (30) days after receipt of each such application the District Board shall hold a public hearing thereon and by duly approved motion recommend that the same be granted, denied or be referred to the Landmarks Preservation Board. Within thirty(30) days after such referral of any such application, the Landmarks Preservation Board shall hold a public hearing thereon and recommend that the same be granted or denied.

NATIONAL HISTORIC PRESERVATION ACT OF 1966, as amended

Section 1 (Purpose of the Act)

(b) The Congress finds and declares that--

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist . .(emphasis added)

Section 2 (Declaration of policy)

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and

individuals (emphasis added) to--

(4) contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means; (emphasis added)

Your Seattle Community Development

Memorandum

BLD-15/76

August 5, 1976

To: Paul E.S. Schell & J. Peter Staten

From: Earl D. Layman, HPO

Subject: Ballard Avenue Landmark District

1. (omitted)

2. As you will recall the second meeting of that afternoon was in essence a community meeting called in response to the petition which requested such a meeting for the purpose of providing community imput into the planning process in the district and particularly for a briefing on the pioneer houses. Approximately 23 persons from the community were in attendance, including the five elected members of the Board. In addition Folke Nyberg and Tom Albright, consultants for the street improvement project were there, Linda

II C.

Aro from Neighborhood Improvement; Al Elliott and Gary Miller of HSPDA; and John Snyder and myself.

We explained to the attendees the reasons why the Board could not yet hold a formal hearing, and also explained that the Ballard Avenue Association had bowed out as sponsors of the meeting. We then proceeded to summarize actions taken in the last two months concerning the pioneer houses, as well as to the procedures involved in setting up the election for the Board. We also read the letter that we prepared for you several weeks ago to Mrs. Kustina concerning these matters. There was extensive discussion on the part of the attendees and most of them seemed satisfied with our explanations. It was evident that many of the people who signed the petition merely wanted more

detailed information as to what had been happening. Four members of the Board strongly supported the houses project, as did the consultants and other people present. It appeared to us very positively that the only strong objections came from Mrs. Helen Kustina and Mr. and Mrs. Carr, who have always been opposed to the establishment of the district, and all three of who refused to participate in the Board elections.

As a result of the above it is the strong opinion both of this office and of Historic Seattle that there is no reason why negotiations and other actions should not continue on a timely basis for the moving of the two houses into the landmark district.

EDL:hg

cc: John W. Snyder
Lawson A. Elliott
Peggy Corley